No. 34704-4-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER NOVIKOFF,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR FERRY COUNTY

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. The trial court erred in concluding that revocation was the only available sanction for a single violation following three years of successful treatment, and the State misreads the record.

After making above-average progress in sex offender treatment for three and a half years, Mr. Novikoff was terminated from treatment for using marijuana following a serious back injury. It is undisputed that this was the only violation after years of diligent participation and that Mr. Novikoff never committed a violation of a sexual nature. Nevertheless, the State moved to revoke the SSOSA instead of requesting lesser sanctions, and the trial court concluded that revocation was the only "available" option. This conclusion was erroneous. Br. of Appellant at 1-16 (citing, inter alia, *State v. Partee*, 141 Wn. App. 355, 170 P.3d 60 (2007); *State v. Badger*, 64 Wn. App. 904, 827 P.2d 318 (1992); RP 219-22; CP 128-37).

In response, the State admits the statute provides alternative sanctions short of revocation. Br. of Respondent at 13. The State also admits that, contrary to the statute, its witness claimed the State "had no choice but to seek revocation of the SSOSA." Br. of Respondent at 9. Yet the State contends the court considered lesser sanctions and concluded that revocation was "appropriate" based on the specific facts of this case. Br. of Respondent at 13, 14. The State is wrong.

The court nowhere used the word "appropriate," and instead considered whether sanctions short of revocation were "available" as a punishment. RP 219, 222; Br. of Appellant at 8. This distinction is critical. The court did not conclude that revocation was "appropriate" based on the facts of this case. The court appreciated Mr. Novikoff's considerable progress and only "grudgingly" revoked the SSOSA based on a legal conclusion that "under *State v. Miller*[1] **that is what I have available to me here**." RP 222 (emphasis added). The court rejected defense counsel's reading of *Miller*, which was that a 60-day sanction was an available punishment that must be considered. RP 219. The court said, "another way to read that would be that if treatment is not available then that's **not an alternative available to the court**, and if it's not then again the – the position would be revocation and prison." RP 219 (emphasis added). This was legal error, and Mr. Novikoff asks this Court to reverse and remand to the trial court to consider the available sanction of a 60-day jail term followed by return to treatment.

The State is also wrong in claiming that Mr. Novikoff could not have returned to treatment after serving a jail term. Br. of Respondent at 14-15. The treatment provider said she would welcome Mr. Novikoff back into her program (albeit "only grudgingly") and said "she would be

[1] *State v. Miller*, 180 Wn. App. 413, 325 P.3d 230 (2014).

willing to continue working with [Mr.] Novikoff, provided he doesn't use marijuana, that he works his program, and that he follows the relapse prevention program." CP 124 (Finding of Fact K). Furthermore, Ms. Peterson is obviously not the only treatment provider available in this state. http://www.doh.wa.gov/Portals/1/Documents/Pubs/695021.pdf (listing several providers in Spokane); *cf. Partee*, 141 Wn. App. at 358-59 (referencing opinions of two different treatment providers and remanding for a new hearing even though defendant, unlike Mr. Novikoff, committed multiple violations during SSOSA, including unapproved contact with minors).

The court could have sanctioned Mr. Novikoff to 60 days in jail followed by a return to treatment. If Mr. Novikoff failed to comply – by neither returning to treatment with Ms. Peterson nor entering treatment with an alternative provider – revocation may have been an appropriate sanction at that time. But the trial court erroneously believed that the only sanction "available" to it for the instant violation was revocation. RP 219, 222. Thus, the court reluctantly imposed this sanction notwithstanding Mr. Novikoff's numerous "positive" reviews during the bulk of the treatment period. *Id.*; CP 122. This Court should reverse and remand to give the trial court the opportunity to consider the available sanction of a jail term followed by return to treatment. Br. of Appellant at 6-16.

2. The trial court erred in concluding that Mr. Novikoff failed to make "satisfactory progress" in treatment, where he was an "above average" participant for over three years and simply had a setback with a single violation of a nonsexual nature.

As discussed in the opening brief, the trial court also erred in concluding that Mr. Novikoff failed to make satisfactory progress in treatment given his positive reviews throughout years of participation. He had a setback during the last four months when he used marijuana for a serious back injury, but overall he made considerable progress. Br. of Appellant at 16-18.

a. The "satisfactory progress" determination is a legal conclusion; if it is a factual finding, the preponderance standard applies, not the "reasonably satisfied" standard.

Although the trial court properly characterized its determination as a legal conclusion (which would be subject to de novo review), the State characterizes it as a factual finding. *Compare* CP 125 *with* Br. of Respondent at 20. The State is wrong. As explained in the opening brief, whether a person's performance is "satisfactory" is generally a matter of judgment, not of fact. Furthermore, the meaning of the phrase "satisfactory progress" is an issue of statutory construction, which is a question of law. Such issues are subject to de novo review. Br. of

Appellant at 16 (citing *State v. Conover*, 183 Wn.2d 706, 711, 355 P.3d 1093 (2015)).

If this Court nevertheless determines that the issue is one of fact, it should note the State is wrong in relying on the "reasonably satisfied" standard as opposed to the preponderance of the evidence standard. Br. of Respondent at 20 (citing *State v. Kuhn*, 81 Wn.2d 648, 650, 503 P.2d 1061 (1972)). The former standard does not comport with due process, and is a relic from the days when due process depended on the distinction between a privilege and a right, rather than on whether the defendant would suffer a grievous loss of liberty.

The case the State cites for the "reasonably satisfied" standard in turn relies on *State v. Shannon*, 60 Wn.2d 883, 889, 376 P.2d 646 (1962). *See Kuhn*, 81 Wn.2d at 650. There, the Court stated, "The granting of a deferred sentence and probation, following a plea or verdict of guilty, is a rehabilitative measure, and as such is not a 'matter of right but is a matter of grace, privilege, or clemency granted to the deserving, and withheld from the undeserving,' within the sound discretion of the trial judge." *Shannon* at 888. Thus:

> The court need not be furnished with evidence establishing beyond a reasonable doubt guilty by the probationer of criminal offenses. All that is required is that the evidence and facts be such as to reasonably satisfy the court that probationer is violating the terms of his probation, or

> engaging in criminal practices, or is abandoned to improper associates, or living a vicious life.

Id. at 888-89 (internal citations omitted).

One of the cases the *Shannon* court relied on was *Escoe v. Zerbst*, 295 U.S. 490, 55 S.Ct. 818, 79 L.Ed.1566 (1935). *See Shannon*, 60 Wn.2d at 888, 889. There, the U.S. Supreme Court held that although the *statute* at issue guaranteed a hearing prior to the revocation of probation, *due process* did not require notice or a hearing prior to revocation:

> [W]e do not accept the petitioner's contention that the privilege has a basis in the Constitution, apart from any statute. Probation or suspension of sentence comes as an act of grace to one convicted of a crime, and may be coupled with such conditions in respect of its duration as Congress may impose.

Escoe, 295 U.S. at 492-93. According to the Court, Congress had the power "to dispense with notice or a hearing" in the context of probation revocation if it wanted to do so. *Id.* at 493.

The Court of course subsequently held to the contrary in *Morrissey v. Brewer*[2] and *Gagnon v. Scarpelli*.[3] In holding that due process *does* guarantee notice and a hearing in the revocation context, the Court renounced the privilege/right distinction espoused in *Escoe*:

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[2] *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972)

[3] *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973).

> We turn, therefore, to the question whether the requirements of due process in general apply to parole revocations. As Mr. Justice Blackmun has written recently, 'this Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.' *Graham v. Richardson*, 403 U.S. 365, 374, 91 S.Ct. 1848, 1853, 29 L.Ed.2d 534 (1971). Whether any procedural protections are due depends on the extent to which an individual will be 'condemned to suffer grievous loss.' *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168, 71 S.Ct. 624, 646, 95 L. Ed. 817 (1951) (Frankfurter, J., concurring), quoted in *Goldberg v. Kelly*, 397 U.S. 254, 263, 90 S.Ct. 1011, 1018, 25 L.Ed.2d 287 (1970).

Morrissey, 408 U.S. at 481; *accord Scarpelli*, 411 U.S. at 782 & n.4 (holding same due process protections apply to probation revocation as to parole revocation and noting, "It is clear at least after *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L. Ed. 2d 484 (1972), that a probationer can no longer be denied due process, in reliance on the dictum in *Escoe v. Zerbst*, 295 U.S. 490, 492, 55 S.Ct. 818, 819, 79 L. Ed. 1566 (1935), that probation is an 'act of grace.'"). Because revocation of both probation and parole constitutes a "grievous loss of liberty," some due process protections apply to these proceedings. *Morrissey*, 408 U.S. at 482; *Scarpelli*, 411 U.S. at 782; U.S. Const. amend. XIV.

These protections include a standard of proof that ensures revocation will be based on "verified facts," rather than merely reasonable belief. *Morrissey*, 408 U.S. at 484. Indeed, in *Morrissey*, the Court

explained that reasonable belief, i.e. probable cause, is the appropriate standard for the *initial hearing*, *not* for the final revocation hearing:

> The first stage occurs when the parolee is arrested and detained, usually at the direction of his parole officer. The second occurs when parole is formally revoked. … [D]ue process would seem to require that some minimal inquiry be conducted at or reasonably near the place of the alleged parole violation or arrest and as promptly as convenient after arrest while information is fresh and sources are available. Such an inquiry should be seen as in the nature of a 'preliminary hearing' to determine whether there is probable cause or reasonable ground to believe that the arrested parolee has committed acts that would constitute a violation of parole conditions.

Id. at 485. Later, the actual revocation hearing "must be the basis for *more than* determining probable cause; it must lead to a final evaluation of any contested relevant facts and consideration of whether the facts as determined warrant revocation." *Id.* at 488 (emphasis added).

Washington state has appropriately abandoned the pre-*Morrissey* standard of proof in certain other types of revocation proceedings. For example, in community custody violation hearings, "[t]he department has the obligation of proving each of the allegations of violations by a preponderance of the evidence." WAC 137-104-050(14). And in *McKay* this Court held that due process requires application of the preponderance of the evidence standard in DOSA revocation hearings – even for individuals who are serving the in-custody portion of DOSA. *State v.*

McKay, 127 Wn. App. 165, 168-69, 110 P.3d 856 (2005). The preponderance standard is necessary to meet the due process requirement that "a violation finding will be based on verified facts … and accurate knowledge." *Id.*

This Court recognized that after *Morrissey*, "[t]he assessment of what process is due depends upon the 'extent to which an individual will be condemned to suffer a grievous loss.'" *Id.* at 169 (quoting *Morrissey*, 408 U.S. at 481). This Court noted that a defendant has "a significant liberty interest" in remaining on community custody. *Id.* at 170. Furthermore, the State also has an interest in ensuring that revocations are based on verified facts and accurate knowledge because the defendant's rehabilitation and reintegration into society serves not only the individual but also the community at large. *Id.* Thus, "[t]he proper standard of proof at DOSA revocations is a preponderance of the evidence." *Id.*

The same must be true for SSOSA revocations. The liberty interest at stake is at least as great in SSOSA revocation hearings as in DOSA revocation hearings. *Cf. Scarpelli*, 411 U.S. at 772 (holding there is no difference for due process purposes between parole revocation hearings and probation revocation hearings); *In re the Personal Restraint of McNeal*, 99 Wn. App. 617, 631-33, 994 P.2d 890 (2000) (liberty interest of individual on community custody is substantially similar to that of a

person on parole, thus same due process protections must be applied at community custody revocation hearings), *disagreed with on other grounds by Grisby v. Herzog*, 190 Wn. App. 786, 362 P.3d 763 (2015). The State's interest in assuring accurate results is also just as great, because, as in the DOSA context, it is better for society if defendants finish treatment and contribute to the community.

In sum, the issue presented is a legal issue subject to de novo review. But if this Court concludes the question is factual, it should hold the State bore the burden of proving unsatisfactory progress by a preponderance of the evidence. This Court would, in turn, review the finding for substantial evidence in light of the preponderance standard, not the "reasonably satisfied" standard.

b. Mr. Novikoff made "satisfactory progress" in treatment, and the cases the State cites are inapposite.

As explained in the opening brief, Mr. Novikoff made significant progress over three and a half years of treatment, earning positive quarterly reports from his treatment provider and praise from the court at review hearings. *See* CP 128-37; RP 99, 103, 167. Mr. Novikoff graduated from group therapy and passed all of his polygraph tests. RP 219-20. He committed no violations for three and a half years and was consistently evaluated as a low risk to reoffend. RP 219. He did such a good job that in

2015 the court told Mr. Novikoff, "You're ahead of schedule. You're doing well." RP 103. In other words, he was on target to complete his treatment early in 2015, and then suffered a setback in 2016. But overall, he made "considerable" progress, and he had only one violation of a non-sexual nature. RP 219. Br. of Appellant at 16-18.

The State claims this Court endorsed "unsatisfactory progress" conclusions in other cases with similar facts. Br. of Respondent at 21-26. The State is wrong, because the cases it cites are significantly different from Mr. Novikoff's.

In *Lane*, the defendant first violated his conditions by having contact with a minor, yet he was sanctioned with only jail time, not revocation. *State v. Lane*, 197 Wash. App. 1037 (2017) at *3. He violated again by using methamphetamine and lying about it, but was *again* sanctioned only to jail time. *Id.* Only after the defendant violated his conditions a third time was his SSOSA revoked, based in part on failure to make satisfactory progress in treatment. *Id.* at 3-4. The trial court noted that it had given the defendant multiple chances, but the defendant was deceptive regarding the same issue for which the court had imposed jail time previously. *Id.* at 4. This Court affirmed because even though the defendant had made some progress in treatment, he *repeatedly* violated the conditions of sentence *including* by having unauthorized contact with

minors and lying about it. *Id.* at 5. Mr. Novikoff's case is nothing like *Lane.*

The same is true for *State v. Wilson*, 199 Wash. App. 1015 (2017). Br. of Respondent at 23. That defendant, unlike Mr. Novikoff, was "consistently noncompliant." *Id.* at *1. That defendant, unlike Mr. Novikoff, was given multiple chances and sanctioned to jail time on two different occasions before finally having his SSOSA revoked after he violated again by using methamphetamine and having unapproved contact with minors. *Id.* This Court concluded, "The trial court had previously given Wilson numerous opportunities to bring his conduct into conformity with the terms and conditions of his suspended sentence. At last, the trial court determined, Wilson's noncompliance had reached 'a tipping point.'" *Id.* at 3. Mr. Novikoff's case is markedly different. He made significant progress in treatment but was revoked following his first and only violation.

The State falsely claims that *State v. Detwiler*, 194 Wash. App. 1005 (2016) "involved a fact pattern nearly identical to the one presently before this Court." Br. of Respondent at 23-24. It is identical only insofar as the violation involved marijuana. But as to the issue of "satisfactory progress," it, like the other cases the State cites, is *nothing* like Mr. Novikoff's case. Mr. Novikoff made "above average" progress for three

and a half years of intense treatment. Detwiler, in contrast, violated his conditions within *two months* of release. *Detwiler* at *3. Detwiler did not make satisfactory progress in two months of treatment, but Mr. Novikoff made laudable progress over years of hard work.

Finally, *State v. Zuvela*, 189 Wash. App. 1051 (2015), is also inapposite. Br. of Respondent at 26.[4] There, the defendant made such poor progress that the State filed revocation petitions on *four* different occasions before the trial court finally revoked the SSOSA. *Id.* at *1-*2. The violations included not only drug use, but also failure to attend treatment and commission of other crimes. *Id.* After giving the defendant three chances to continue with the SSOSA following violations, the court reasonably concluded the defendant failed to make satisfactory progress. *Id.* Here, again, Mr. Novikoff's behavior was markedly different. He committed only one violation and this was simply a setback following years of progress.

In sum, the trial court erred in concluding Mr. Novikoff failed to make satisfactory progress in treatment. For this independent reason, this Court should reverse and remand for the trial court to consider a lesser sanction for the single violation.

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[4] Mr. Novikoff already explained why *Miller* is inapposite. *See* Br. of Respondent at 26-27; Br. of Appellant at 7-9 (discussing *Miller*, 180 Wn. App. at 415-24).

B. CONCLUSION

For the reasons set forth above and in the opening brief, Mr. Novikoff asks this Court to reverse the revocation order and remand for the trial court to consider a sanction of jail time followed by return to treatment.

DATED this 11th day of September, 2017.

Respectfully submitted,

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	)	NO. 34704-4-III
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	)	
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	)	
Appellant.	)	

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